
Title: Considering the Attitude of Common Law System on Principle of Good Faith: With Emphasis on its Overview in the CISG

YASER FARMANI¹

PhD student

University Kebangsaan Malaysia (National University of Malaysia) Faculty of Law UKM Bangi, Selangor 43600, Malaysia

DR. ANOWAR ZAHID²

Senior Lecturer

University Kebangsaan Malaysia (National University of Malaysia) Faculty of Law UKM Bangi, Selangor 43600, Malaysia

MOHAMMAD MOGHADAMFARD³

PhD student

University Kebangsaan Malaysia (National University of Malaysia) Faculty of Law UKM Bangi, Selangor 43600, Malaysia

MOHAMAD NAJI SHAHMOHAMADI⁴

PhD student

University Kebangsaan Malaysia (National University of Malaysia) Faculty of Law UKM Bangi, Selangor 43600, Malaysia

ABSTRACT:

Good faith is raised as a significant issue in the common law system. It is visible in many statute documents in common law countries as well as many international treaties in which common law countries are signatories. However, the problem still exists. In common law this principle is not generally accepted as a governing rule in contracts, but it can be said that in special cases, like consumer law and insurance law it plays a main role. The reason for this view in common law maybe due to the traditional view point on the originality of the contract and avoiding a legal principle with high power that can make changes in the contract. However, a modern view point in common law is beginning to emerge, which highly recommends strengthening good faith in the contract.

KEYWORDS: *common law system, good faith, ciscg, international trade law.*

INTRODUCTION:

The legal common family law⁵, English law and countries under the influence of the British Empire in the past are members of this system. Rules and acts in this system made by judges⁶

¹ -yaserfarmani@siswa.ukm.edu.my

² -Dr.anowar.zahid@gmail.com

³ -m.moghadamfard@gmail.com

⁴ -najishahmohamadi@yahoo.com

⁵ "The common law tradition emerges in England during the middle ages and was applied within British colonies across continents." Bakery, The common law and civil law traditions, 2010, Available at: (<http://www.law.Bakerly.edu>)

thoughts and benches' arbitrations are influenced by precedent which courts are required to observe⁷. The main purpose in common law is finding a solution for current abnormalities in society and making a balance for disturbed discipline, not expressing a general rule for the future, but with legal assistance. In English law, which is an example of common law, good faith has not been recognized as a pure contractual relationship⁸. The main target of every contract is performance and obligation to the contract. In this way, for having a parallel between parties' right and purpose, the role of interpretation begins and one of the most important issues required in interpretation is good faith.

In the common law system, this debate is visible in law books and is called as construction and interpretation⁹. In this system, it is understandable that the intention and target of parties in a contract is the main reason of interpretation. Interpretation is "The art or process of discovering and ascertaining the meaning of a Statute, Will, Contract, or other written document. The discovery and representation of the true meaning of any sign used to convey ideas"¹⁰ and according to equity in common law, attention to the contractual words cannot block good faith effect in a contract and the judge should not neglect good faith and bad faith in the contract¹¹. In general good faith in common law and in performance of contract is not as familiar as good faith in civil law, and there is also a good attitude to good faith in this system; but it is not easy to find an absolute territory for it and the parties must follow their contractual rights without paying attention to individual intentions unless in special cases. Roy Goods mentioned that basically contractual rights are performable without attention to intonation and if a party in performance time does not have good faith, this point cannot block his rights¹². According to Tately: "Defining good faith is a formidable task"¹³, and Powers illustrated that it is "an elusive term best left to lawyers and judges to define over a period of time as circumstances require"¹⁴.

Overall, finding a definition for it is a problem in civil law. In this system, especially the performance of contract good faith is less important as a rule, because in English law for example, if a party does not perform an obligation he is responsible even if he does not make a mistake and his intentions are not important to the courts. In other words, Primary responsibility is the obligation to pay compensation, and so if a party with good faith tries to act to oblige, but due to other reasons is not successful, it does not reduce his responsibility. However, there are many cases in which Good Faith in the judicial system has been considered. For example, in a

⁶ Peter J. Messitte, COMMON LAW V. CIVIL LAW SYSTEMS, he illustrates that: "It is often said that the common law system consists of unwritten "judge-made" law while the civil law system is composed of written codes. For the most part, law in the United States today is "made" by the legislative branch. To some extent, however, the judge-made law analogy is true."

⁷ Judge Peter J. Messitte believes: "the United States, along with England and other countries once part of the British Empire, belong to the common law system", COMMON LAW V. CIVIL LAW SYSTEMS, Peter J. Messitte, available at: (web.ntpu.edu.tw/~markliu/)

⁸ -R.S. Ashton, ASPECTS OF THE LAW OF GOOD FAITH(A paper presented to the Australian Insurance Law Association Insurance Law Intensive),2006, (Available at: www.law.uq.edu.au/.../law/.../ashton), p:1

Which states: So far as concerns the application to contracts in general, English law has not recognized a good faith obligation save in the case of particular kinds of relationships such as fiduciary relationships.

⁹ - RANDY E. BARNETT, INTERPRETATION AND CONSTRUCTION, 2010, Harvard Journal of Law & Public Policy, Vol: 34, no: 1. See also; Alavi Seyed Mohammad Taghi and Babazade Babak, interpretation of contract in common law system, 2011, Allameh Quarterly Journal – Special, Tenth year, No:29,

¹⁰ -Campbell Henry, 1983, blacks Law Dictionary, 15 th edit, U.S.A, West Publish, 1983. P.420

¹¹ -Barker David and patfield, Colin, Law Made Simple, 1998, 10Th edit, Tehran, mizan Pub, 1998. op cit, 142

¹² - Good Roy, (1994), The Concept of Good Faith in English Law, p. 4)... Available in Pace University School of Laws Home Page.(<http://www.cisg.law.pace.edu/cisg/biblio/goode1.html>)

¹³ -Tately William , Good Faith in Contract Particularly in the Contracts of Arbitration and Chartering, 2004, McGill University, (published in (2004) 35 JMLC 561-616

¹⁴ - P. J Powers, "Defining the Indefinable: Good Faith and the United Nations Convention on the Contracts for the International Sale of Goods" (1999) 18 J.L. & Com. 333 at 333.

fundamental breach¹⁵ of a commitment, which creates extensive damage to another party, and the first party has sufficient information on this damage, the right to terminate is awarded to the injured party¹⁶. It seems the reason of this grant is nonconformity of good faith.

Another example is the recommendation for performance of contract and in this case if the promisor noted the performance of contract to promise, but he did not perform, the bidder party is cleared of the Contractual Responsibility¹⁷. The reason assigned is good faith, but if the promisee made a claim this is a positive pleading for the promisor, that is not observed as good faith. Another case is the time when the contract becomes infertile and after creation of the contract it was prevented from performance, which makes it illegal. According to Trietle¹⁸, until 1863 each party should perform his contractual obligation in every circumstance and no event could be a reason for abjuration even if its performance becomes too hard. In another case, an English court calculates loss of contract subject as a reason for promisor exemption. In this case, the defendant promised to rent a music hall to the plaintiff for four days for a concert, but before the first day a fire destroyed the hall. The judge voted that an unintended and unexpected cause cannot be a legal reason for remedy and that the defendant was not responsible¹⁹. This development in attitude to good faith is continued in article 7 of CISG²⁰, which leads to the theory that if parties could not fulfill their contractual obligations even if the contract was performed legally, the good faith principle is inapplicable.

Good Faith accusations in common law:

Individual benefit is naturally an undeniable factor in contracts and as Bigwood said: it is "... ideology of liberal individualism"²¹ which usually is unrestrained to all parties' with reasonable expectations from a contract, which may not be stated in the contract. In fact these reasonable expectations or legitimate interests indicate for good faith contractual duties in common law. In fact the good faith function turns into a contract protector in this system²². Perhaps there is general concern between contract freedom and pleasantness of contract for their real intentions, a contrast which creates good faith effects on contract freedom anyway.

One of the good faith accusations is the point that when two traders with high contractual ability, are facing each other, why should not they use their ability completely, especially when they are both wealthy and experienced, so that they can provide their commercial benefits easily and without help. Why should an ethical- legal factor like Good Faith limit this ability? In other words, why should the courts use good faith to interfere in the parties contract? According to a scholar's opinion, good faith is only a theoretical assumption which has a weak function in

15 - Fundamental breach occurs when an injured party is denied from the contractual benefit, basically. (Tately William, Good Faith in Contract Particularly in the Contracts of Arbitration and Chartering, 2004 p:19) And also see Article 25 of CISG.

16 - Barker David and Padfield Colin, (2006), Law Made Simple, 10th ed, Tehran, Majd Publication ,p. 274-75

17 -Barker David Padfeild colin , Law Made Simple 2006, p. 273

18 - Treitel Guenter, The Law of Contract, , (2003), 3rd ed, London, Sweet &Maxwell pub .p: 866

19 -KATUZIAN 1380, 114

20 - CISG, (1980) article7: (1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade. (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

21 -R. Bigwood, conscience and liberal conception of contract: observing basic distinctions, Part: II, 2000, 16 JCL 191, P 203.

22 -Dixon, William M (2005) Common Law Obligations of Good Faith in Australian Commercial Contracts-A

Relational Recipe. Australian Business Law Review33 (2):pp. 87-98.(p8) available at: <http://eprints.qut.edu.au>

the practical world and should not enter into the legal area: "Good faith... is an imperfect translation of an ethical standard into legal ideology and legal rules. However much it might stimulate research or encourage inquiry into theories underlying contract law, its' appropriate home is the university where it can perform these functions without wreaking practical mischief"²³.

It seems that the limited common law views are going to change step by step and such discussions find their place as good faith and fair dealing is introduced as a solution for business disputes. These attitudes will change community expectations, create a new judicial attitude in common law, and show a toggle in obligations of good faith in contractual performance and enforcement. This view in common law will lead to good faith iterance in trade systems and is more important than current protective worries on contract freedom²⁴.

For example in a common law case²⁵, two companies make a 60 day contract for trade in a commercial reality area. The time of contract in fact was of essence and this subject was expressly pointed out in one of the contract articles. The problem occurred when the contract turned to settlement after 120 days when there was an obstacle to obtain the finance within the mentioned time. In that time the buyer had paid a massive amount for deposit, while the seller makes a decision to terminate the contract and forfeits the deposit, and hopes that he can sell it at a better price in the future. William Dixon²⁶ has an interesting analyze for this case which obviously shows good faith effect: if good faith is not observed in this case it leads to no treatment for the sellers termination due to contractual obligations; but if the judge observes good faith in this act the contract should be amended to imply that this termination is bonded to the contract and make way for the parties for standard justice.

Regarding the intonation in faced by insipid contract:

The importance of authenticity of contract in common law compared with other legal systems is bolder and not surprisingly, the intention definition is more according to the contract articles that are indeed the parties real intention. The parties should follow them and until the parties act according to the contract no problems will occur, even if their acts have a contrast in good faith. In common law cases this point is clarified, and although the general desire of scholars leads to acceptance of good faith as a predominant term in every contract, but it's performing ability is not found easily enough in the law and may simply block a unilateral termination of the contract.

At first it may appear that these cases cannot be a suitable criterion for a general understanding, but the civil law thinking should see this with a common law view point. In good faith issue is the same and a common law researcher should investigate this issue as well. One of the scholars²⁷ on good faith and motivational power mentioned that: Good faith is not sufficiently objective because it leads to the subject of motives of the parties concerned.

23 -M Bridge, 'Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?' (1984) 9 Can Bus LJ 385, 412.

24 - Dixon, William M (2005) Common Law Obligations of Good Faith in Australian Commercial Contracts, p:4

He about the Australian judiciary in good faith, explains that: "As it impacts on the performance and enforcement of commercial contracts, while there remain members of the Australian judiciary who clearly favor the traditional approach, underpinned by an adversarial model and public policy concerns for freedom and certainty of contract, concerns of this nature seem less important to those who see the need for an infusion of good faith into Australian commercial life. In this regard, it is fair to say that a common law obligation of good faith in contractual performance and enforcement is emerging from the decisions of courts lower in the Australian judicial hierarchy"

25 - An Australian case

26 - William Michael Dixon, Doctor of juridical science

27 - S M Waddams, 'Good Faith, Unconscionability and Reasonable Expectations' (1995) 9 JCL 55, 63-64.

The contractual relationship in the common law system serves as a guide that leads to commercial dealing and trade relationships. Commercial dealing in itself is characterized by self-imposed norms of behavior protected by a self-interest and profit-maximization relationship²⁸. Generally the relationship governing the common law focused on the contract and the concepts like good faith for acceptance in the contract needs several conditions and should pass the contractual step. But this discussion cannot lead to ignorance of common law prosperities about good faith.

Good faith and fair dealing in performance of contracts in a common law attitude:

Claims like failure to comply with good faith and fair dealing are visible in all common law practitioners' opinions²⁹. In other words, the importance of good faith and fair dealing observance is taken into consideration much more than before. The tendency for an increase in good faith is in fact a part of contract terms and parties should observe it, and the lack of this principle leads to similar results as a contract breach. This situation is observable in many kinds of contracts. Even Shannon quoted Meehan J. of the Ontario Superior Court: "There is also every argument that express recognition of good faith has improved the law because, it brings simplicity and clarity" for the contracts. In the other words, the gift of good faith to the law is simplicity and clarity in contractual relationships.

Good faith is a pragmatic concept which helps to solve failures in the law which comes from bad expression in the law³⁰. The role of Good faith in contracts can be analyzed in the following way: In negotiations, the parties enter into the contract in good faith and in making a fair contract express their contractual purposes. After that in the performance step, parties begin to fulfill their obligations frankly and without intention of any harm, fraud or misrepresentation. If the contract is executed, the parties should perform restoration with considerations according to good faith and contractual enforcement based on good faith.

Differences in good faith concept in the common law have roots in the public unwillingness to changes in the contract terms originality of good faith. This situation is clearly visible in some common law cases. A Canadian court³¹ expressed that: there is no accurate definition of good faith, but in employment contracts traits such as reasonableness and honesty are placed in front of untruthful and misleading, and they are on the edge.

5-Common law challenge with a general concept in contract law:

Good faith in common law is the first step, emerging as a dump principle conceptually, and there are lots of basic debates about this issue. Is it possible that the good faith principle be

28 - Dixon, William M (2005) Common Law Obligations of Good Faith in Australian Commercial Contracts-A Relational Recipe. Australian Business Law Review 33(2);pp. 87-98.

He about the Macneil's theory in contract law "the contract continuum" adds:Macneil's continuum is consistent with empirical studies that have repeatedly confirmed that relational norms of honesty, trust and flexibility form the foundation of a successful long-term commercial contractual relationship. From the pioneering work of Professor Stewart Macaulay in the United States in the 1960's, Beale and Dugdale in the United Kingdom in the 1970's and more recently the work of Arrighetti, Bachmann and Deakin in the United Kingdom and Europe in the mid-1990's it has been demonstrated that commercial dealings of this nature are characterized by these self-imposed norms of behavior Underpinned by a rationale of self-interest and profit-maximization."

This analyzes briefly shows the successful researches in long term commercial contractual relationship in different countries with common law systems.

29 - Shannon Kathleen O'Byrne, THE IMPLIED TERM OF GOOD FAITH AND FAIR DEALING: RECENT DEVELOPMENTS, 2007, LA REVUE DU BARREAU CANADIEN, Vol.86, No. 2.

30 -F. Paul Morrison and Hovsep Afarian, "Good Faith in Contracts: A Continuing Evolution" in Justice Todd Archibald and Michael Cochrane, eds., Annual Review of Civil Litigation, 2003 (Toronto: Carswell, 2004) 197 at 224

31 - Wallace v. United Grain Growers Ltd. (c.o.b. Public Press), [1997] 3 S.C.R.701 at para. 98 [Wallace].(Supreme Court of Canada in Wallace v. United Grain Growers)Shannon noted that: The Supreme Court of Canada in Wallace v. United Grain Growers acknowledged that "[t]he obligation of good faith and fair dealing is incapable of precise definition," but that in an employment contract, this requires employers to be "candid, reasonable, honest and forthright with their employees" and to "refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive.

considered as a base in a contract or is imposed on the contract? Some people believe that good faith is "a vitally important ingredient for the modern general law of contract"³². In other words, this point should be considered by parties at the beginning of contract, accept good faith as a base of their contract or in fact after making the contract, this principle should begin to emerge and monitor the performance. With all the doubts about complete acceptance of good faith in common law, governing of good faith in performance is an accepted principle. Good faith is important in civil law and is more visible compared with common law. For example, in French law this principle governs all contractual relationships until it is breached³³.

In fact consent of the parties is also considered in good faith, and it seems common law lawyers, according to accelerated developments in trade relationships, feel a greater need to the observance of good faith in contracts. Needs like: how to provide the contract terms, making a legal balance in parties conduct, attention to changes in modern contract law, making and interpretation of contracts, changing in contract conditions and protecting the consumer law in a standard system. All the above mentioned points constitute the current status of good faith in contract law nationally or internationally. Based on the historical background in common law perhaps it can be said that the issue like good faith was assumed between past lawyers or raised as a side issue with limited domination. But nowadays according to the reasons mentioned, good faith in common law finds special importance as an independent topic with specific headlines. Common law researchers have made tremendous efforts to conform their legal system to this principle.

These changes may have disposed common law governments and judiciaries to special attention in good faith transformation in making contracts. Recently common law and other legal systems have exercised their duty, with codification complete and suitable rules which contains good faith and fair dealing, to prevent unusual profit seeking by a supplier who is without good faith and recognizes his dominance. He also recognizes the other party as an underdog, the weakness of the law on good faith, ignores the vulnerable applier and arranges the contract terms to his own benefit and the detriment of another. These conditions usually are not contained as criminal titles or titles like misrepresentations or mistakes, but its harmful results may be more than the mentioned titles. Also society trade discipline and law of contracts are not protected under this situation. So good faith and fair dealing as a guide and protection principle achieves an important place. Protection means to look at this principle as a protector from an unrestrained contract, because it is obvious that there is no rule which can foresee all sides of parties satisfaction from the contract, and sometimes the law becomes an instrument for extortion against one party.

A traditional difference between common law and civil law is the concept of attitude in good faith³⁴. It seems there is an attitude in common law systems, which accept concepts like good faith in the law of contracts³⁵. Although as Macqueen said the common law does not

32 - Zimmerman Reinhardt and Whittaker Simon, *Good Faith in European Contract Law*, 2000, First Publish, Cambridge University Press, P: 13.

Mentioned: "comparative studies normally focus on specific subject matters, problem areas and real life situations, or on relatively well-defined legal institution like mistake, agency or stipulatealteri. Good faith fits into neither of these categories

33 - Article 1134, France Civil Cod

34 - Hector L McQueen, *GOOD FAITH IN THE SCOTS LAW OF CONTRACT: AN UNDISCLOSED PRINCIPLE?*, 1999, Hart Publishing, Oxford, (1999), 5-37 (available at: [frontpage.cbs.dk/law/commission on...law/.../Good%20Faith.pdf](http://frontpage.cbs.dk/law/commission%20on%20law/.../Good%20Faith.pdf))

35- Hector L Macqueen, *GOOD FAITH IN THE SCOTS LAW OF CONTRACT: AN UNDISCLOSED PRINCIPLE?*
He about European law, illustrate that:

encourage bad faith in the contract³⁶, but there is no tendency to overuse the same principle in the parties intentions.

Attention to double-sided rules in common law:

Paying attention to legal-ethical rules in common law is obvious³⁷ and attention to contractual terms is not an obstacle to external factors as interpretation instruments. Factors like equity and good faith help judges for recognizing bad faith of a party and not observe equity rules in the contract. In this situation, the judge will try to interpret the contract against the bad faith targets in the contract. Even though he does not give legal effect to the contract, while the party hides the thought about the contract process and apparently acts according to the law³⁸.

There are some contracts in the common law system where the good faith principle is fundamental and the absence of this principle will destroy them. These contracts are well-known as "contracts uberrime fidei"³⁹ which means contracts with maximum of good faith. Such contracts include insurance contracts, sale of land contracts and family agreements.

In insurance contracts, parties have to have maximum of good faith and avoid secrecy and wrong information. This duty is compulsory for both the insured and insurer and they cannot abstain from saying the truth or act against the right process of the contract. In sale of land contracts the seller should expose all defects in his land according to good faith and honesty and not have bad faith in his description. In family agreements every change in family properties or situations in these properties and so on, should be done accordingly with maximum of good faith.

Conclusion:

It is clear that in the common law system two view points on good faith is fundamental. In the traditional view point, acceptance of good faith in the contract is limited. This means that this principle is not a general governing principle in the contract and it is usable only in special cases. However, from the modern view point in common law, it is believed that good faith exists with the contract from the beginning until the end. In fact, even pre contractual negotiations should be performed according to good faith and this principle as an absolutely implied term which exists in all steps of a contract. In contracts with maximum of good faith "contracts undermine fidei", the system for detecting good faith is interpreted beyond the contract words. In such contracts, a parties' lack of bad faith should be proven to the judge, and he uses a wider interpretation for detecting the good faith. He is careful not to expand the interpretation domination that makes the change in the contract. Whenever the common law system judge reaches the conclusion that one party does not observe "good faith", the other party will be entitled to terminate the contract.

"It is best to begin with some discussion of what is meant by good faith in contract law. This has been the subject of much debate in recent times. The background is that the existence or otherwise of such a principle in contract law is one of the major divisions between the Civilian and Common Law systems in Europe."

36 - maybe his mean is blocking the principle which effected on parties intonation in the contract but the thing which understood from his quotation is a protecting view for the contracts:"... English and Irish law are almost equally explicitly opposed to such broad concepts" and: "...This is not to say that the Common Law is happy to countenance bad faith in contracts" and after that he say: "...avoid any commitment to over-riding principle in favor of piecemeal solutions in response to demonstrated problems of unfairness".

37 - Smith-Keenan's, English Law, 13th edit, London, Longman Pub, 2001, 8

38 - Barker David and Padfield Colin, (2006), Law Made Simple, 10th ed, Tehran, Majd Publication, 142

39 - Barker David and Padfield Colin, (2006), Law Made Simple,142

ACKNOWLEDGEMENT

I am using this opportunity to express my gratitude to Dr Anowar Zahid who supervised me throughout the paper writing period and faculty of law members in UKM. I am thankful for their support and guidance.

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"Harmonising Law and Social Norms"

International Conference on Law, Policy and Social Justice (ICLAPS 2014)

10 - 11 September 2014



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